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No. 86-714

In the Supreme Court of the United States

OCTOBER TERM, 1986

RODNEY P. WESTFALL, ET AL.,
Petitioners

v.

WILLIAM T. ERWIN, SR., and EMELY ERWIN,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

M. Clay Alspaugh
HOGAN, SMITH, ALSPAUGH
SAMPLES & PRATT, P.C.
1000 City Federal Building
Birmingham, Alabama 35203
(205) 324-5635

QUESTION PRESENTED

Respondents are satisfied with petitioners statement of the question.

PARTIES TO THE PROCEEDING

Respondents are satisfied with petitioners listing of "Parties to the Proceeding".

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STATEMENT

Respondents are satisfied with the "Statement" of petitioners and adopts same by reference.

SUMMARY OF ARGUMENT

This action was brought under Alabama State Law, §25-5-11, Code of Alabama, 1975, to recover damages from supervisory employees for personal injuries to the plaintiff, and a derivative suit by the wife, for failure to adequately warn, store, or deliver caustic soda ash at an Army facility. This Court, in *Barr v. Matteo*, 360 U.S. 564 (1959) and subsequently in *Doe v. McMillan*, 412 U.S. 306 (1973) has established a two-prong test in order to invoke governmental immunity for governmental employees sued as a consequence of their activities. Only if the challenged conduct is a discretionary act, and is within the outer perimeter of the employee's line of duty, should immunity attach. The mere fact that all activities involve some discretion does not provide the requisite proof so as to provide immunity. To hold otherwise, would establish, as a matter of law, absolute immunity from common law and state law causes of action against employees of the government. Only if the acts involve planning or policy considerations and do not concern day-to-day operations, should the acts be classified as discretionary so as to provide a potential for immunity.

This Court's decisions have, since this issue was first addressed, provided protection from suit in circumstances where it is necessary to avoid the disruption of federal governmental functions, and, have consistently refused to extend the discretion where the contributions of immunity to effective government do not out-weigh the recurring potential harm to individual citizens. To establish a classification of immunity wherein a "modicum" of discretion is all that is necessary, when coupled with an activity within the outer perimeters of the job, to establish immunity would circumvent, if not destroy, the functional test that has been applied consistently since *Barr*, in determining the appropriateness of immunity. There is no activity that does not have a "modicum" of discretion. This Court, and the interpretations of this Court, have always held that if the function involved the orderly conduct of government, and the decision making process involves discretion to ac-

complish those means, then immunity should attach, and if not, it should not.

Petitioners herein, asks for a change in the law to in essence establish absolute immunity for all government employees under all circumstances. As this Court has recognized, there has been no good reason for such a broad interpretation in establishing governmental immunity and certainly petitioners herein have not shown the need for change.

Federal employees, if acting within the outer perimeters of their authority, and exercising discretionary functions that involve planning or policy considerations but do not concern day-to-day operations under the cases, are entitled to immunity. If either of the tests are not met, then they are not entitled to immunity. The Court of Appeals correctly held that there was a material question as to whether or not the complained of acts by the petitioners herein were discretionary, thus reversing the district court's grant of summary judgment. Such holding by the Court of Appeals was the correct holding and should be affirmed.

ARGUMENT

PETITIONERS ARE NOT ENTITLED TO IMMUNITY FOR PERSONAL LIABILITY FOR INJURIES CAUSED BY THEIR CONDUCT WHEN SUCH CONDUCT ARISES OUT OF DAY-TO-DAY OPERATIONS AND DOES NOT INVOLVE PLANNING OR POLICY CONSIDERATIONS.

The petitioners herein, have consistently argued and would have this Court hold that virtually all government employees acting *within the line and scope of their duties*, not withstanding whether those duties involved discretionary decision-making activities, or only involved operational, ministerial activities, should, under the previous holdings of this Court, be absolutely immune from tort liability. Petitioners, however, have apparently recognized the two-prong approach of definition of duties, to-wit: that the activities of the government employees were within the outer perimeters of their duties, and that in carrying out their duties they were exercising discretionary functions. The use of the term "discretionary function" in the context of day-to-day operations, is so ambiguous so as to make succinct definition of same impossible. Therefore, their argument is that since all activities involve some discretion, all activities, though operational in nature, should be considered discretionary so that immunity applies.[1]

The petitioners base the aforesaid argument on this Court's seminal decision on this issue, *Barr v. Matteo*, 360 U.S. 564 (1959). The petitioners interpretation of *Barr* can be supported only upon the most superficial analysis of *Barr*

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[1]Respondents do not assert, nor have they ever asserted, that petitioners were not acting within the outer perimeters of their duties, which, upon proof, would in and of itself defeat immunity if those activities involved governing. To the contrary, it is conceded that these petitioners were indeed acting within the "outer perimeters" of their authorities, but, that the activities in which they were engaged were ministerial and/or operational, and not "discretionary" within this Court's previous definitions of discretion, so that direct actions against them for negligent conduct would not effect the orderly administration of government.

resulting in an unreasoned and overly broad application of its tenants. Careful probing into and consideration of the policy sought to be advanced by *Barr,* reveals plainly that reliance upon the immunity doctrine in not proper under the facts of this case, nor was it the intent of this Court to in fact immunize Government Employees, though acting in the outer perimeter of their authorities, with any activity that involved the most minute discretion. The Eleventh Circuit, thus correctly rejected the immunity defense as a bar to this action.

The facts and holding of *Barr* are well known. The defendant in that case was the Acting Director of the Office of Rent Stablization. He was sued by two subordinate employees who alleged that he had libeled them in a press release made by the defendant, dealing with his suspension of the two employees. The defense was absolute executive immunity. In the plurality opinion, this Court expanded the scope of *Spalding v. Vilas,* 161 U.S. 483 (1896), holding that the immunity doctrine indeed did preclude liability for *libel* by the defendant *Barr.*[2]

Clearly expressed, both in the letter and spirit by this passage by Justice Hand, is concern for protection of the need of government to make and execute choices between

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[2] The Court, through Justice Harlan, reasoned as follows: "The reasons for the recognition of the privilege has been often stated. It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of duties — suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government. The matter has been admirably expressed by Judge Learned Hand: 'it does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to

conflicting policies, which, of necessity, impacts upon the interests of private citizens. At the very core of the concept of government is the obligation to select and promote certain social values over others, whether on the grand scale of national government or on the local, provincial scale of a small town council. Government is a delicate balance among competing interests. Thus, at the core of the concept of government is the need to make judgments, exercise discretion, and otherwise act without the aid of clear, unambiguous, or unqualified guidelines.

Barr was concerned not only with the direct policy-making function of government, but also the discretionary executive of policy. Policies adopted by government are broad statements of principle, often providing only vague guidelines for application to particular factual circumstances. The need to execute the policy under *every* set of facts necessarily requires that executive officers interpret policy and make judgments about the properiety and extent to which a given governmental policy applies to a given set of circumstances. The use of discretion and judgment by *executive* officers is governmental in as much sense as the formation of policy. The Court in *Barr* obviously feared that executive officers, who were required to use their vaguely guided discretion and judgment to carry out policy, would be deterred from doing so if faced with being sued for executive governmental policy.[3]

However, *Barr* also recognized the unavailability of absolute immunity in all circumstances. "It is not the title of his

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be founded on a mistake, in the fact of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. . . ." *Barr v. Matteo*, 360 U.S. 571-2.

[3]Such suits, the Court feared, would "inhibit the fearless, vigorous, and effective administration of policies of government". *Barr*, at 571.

office but the duties with which the particular officer sought to be made to respond in damages is entrusted — the relation of the act complained of to 'matters committed by law to his control or supervision', *Spalding v. Vilas, supra.* (161 U.S. at 498) which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity from civil defamation suits. *Barr,* at 573-4.

Progeny of *Barr,* clearly enounced the limited scope and intent of this Court. *Doe v. McMillan,* 412 U.S. 306 (1973), a case which centered in part on the scope of the Speech and Debate Clause in relation to the immunity of members of Congress and their aides, nevertheless, involved the *Barr*-type immunity as related to the Superintendent of Documents and the Public Printer. Congress had conducted an investigation into the quality of education in the District of Columbia school system and, after its completion, printed a report that revealed certain test scores of the plaintiffs. The report was printed and distributed to the public by the Public Printer and Superintendent of Documents, respectively. The plaintiffs sued members of Congress, their staff aides, and the Public Printer and Superintendent of Documents for defamation. After disposing of the claims against the members of Congress and their aides,[4] this Court turned to the asserted executive immunity of the remaining defendants.

Beginning with the discussion of *Barr v. Matteo, supra,* the Court first emphasized that "the immunity conferred might not be the same for all officials for all purposes" (*Doe,* at 319). The scope of that immunity necessarily bears a relationship to the authority of the officer and the context in which he acts.[5]

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[4] *Doe v. McMillan,* 412 U.S. 306, 317-18 (1973).

[5] The *Doe* Court explained: "Because the Court has not fashioned a fixed, invariable rule of immunity but has advised a discerning inquiry into whether the contributions of immunity to effective government in particular contexts outweigh the perhaps recurring harm to individual citizens, there is no ready-made answer as to whether the remaining federal respondents — the Public Printer and the Superintendent of Documents — should be accorded absolute immunity in this case. *Id.* at 320.

The *Doe* Court, in delineating "the functions and duties" of the defendants[6] held the fact that the defendants were acting within the "outer perimeter" of their duties was *not* enough in and of itself to invoke the immunity doctrine. The policy underlying the doctrine is the desire to free the *discretionary* judgments of executive officials from questioning by suit. The claim to the immunity defense by the governmental employees in *Doe* failed, the Court wrote, because of the absence of discretionary authority invested in the defendants;[7] the Public Printer and Superintendent of Documents were required to print and distribute whatever documents were properly presented to them by other agencies of the government. By this reasoning, the Court reversed the grant of immunity to those defendants by the lower courts.

The key importance of *Doe, supra,* lies in the analysis of discretion as a critical factor in the legitimacy of the executive immunity. Plainly stated in *Barr* was the policy decision supporting the immunity: fear that suits would deter executive officials from exercising discretion to carry out the "fearless, vigorous, and effective *administration* of policies of government". *Id.,* at 571 (emphasis supplied). The *Doe* Court, in applying *Barr,* realized the discretion involved in the acts of the administration of the policies of government. The discretion exercised by the Public Printer and the Superintendent of Documents was something other than "governmental". Although this Court did not characterize that "discretion" as "ministerial", as have other courts following *Doe*[8], it did plainly hold that that type of discretion was not the type sought to be protected by the immunity doctrine.

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[6]By analyzing the functions and duties of the defendants, this Court gave rise to the "functional analysis" later used by various circuit courts of appeals. *see Stepanian v. Addis,* 699 F.2d 1046 (11th Cir. 1983).

[7]The Court stated "(t)he Public Printer and the Superintendent of Documents exercise discretion only with respect to estimating the demand for particular documents and adjusting the supply accordingly." *Doe,* at 323.

[8]See, e.g., *Johnson v. Alldredge,* 488 F.2d 820 (3rd Cir. 1973); *Henderson v. Bluemink,* 511 F.2d 399 (D.C. Cir. 1974); *Davis v. Knud-Hansen Memorial Hospital,*

Based on the guidance provided by this Court in *Barr, supra,* and *Doe, supra,* the lower Federal Courts, both on the circuit and district levels, have struggled to fashion a principled, consistent doctrine of executive immunity. By and large, the courts have agreed that the immunity doctrine entails two crucial elements: first, that the federal official act within the "outer perimeter" of his authority and, second, that he be performing a "discretionary function".[9] The test developed by these cases is best stated as follows:

> *Barr* also makes clear that executive officials are not automatically immune from all damage suits. Both the plurality and Justice Black's concurring opinion follow the previously established law regarding executive immunity, requiring that two criteria be met before such immunity is found. First, as *Barr* makes clear, immunity protects officials from liability only for actions having a policy-making or judgmental element. This requirement has sometimes been phrased as permitting officials to enjoy immunity from liability for the exercise of "discretionary" but not "ministerial" functions. It reflects the purpose for which immunity is granted to executive, as well as judicial and legislative officers: to ensure that important decisions are made free from the fear of personal liability or harassing suits.
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> The second requirement, also noted in *Barr,* is that the alleged wrongful acts must have been "within the outer perimeter" of the defendant-official's duties.
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> (*Johnson v. Alldredge,* 488 F.2d 820, 824 (3rd Cir. 1973).

The Fifth Circuit additionally applied the same interpre-

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635 F.2d 179 (3rd Cir. 1980); *Queen v. Tennessee Valley Authority,* 689 F.2d 80 (6th Cir. 1982); *Lojuk v. Quandt,* 706 F.2d 1456 (7th Cir. 1983). See also, *Spencer v. General Hospital of District of Columbia,* 425 F.2d 479 (D.C. Cir. 1969) and *Estate of Burks v. Ross,* 438 F.2d 230 (6th Cir. 1971), which pre-dated *Doe v. McMillan,* 412 U.S. 306 (1973), but which anticipated the restrictive holding in *Doe.*

[9] *Estate of Burks v. Ross,* 438 F.2d 230 (6th Cir. 1971); *Johnson v. Alldredge,* 488 F.2d 820 (3rd Cir. 1973); *Berberian v. Gibney,* 514 F.2d 790 (1st Cir. 1975); *George v. Kay,* 632 F.2d 1103 (4th Cir. 1980); *Newkirk v. Allen,* 522 F. Supp. 8 (S.D.N.Y. 1982); *Chavez v. Singer,* 698 F.2d 420 (10th Cir. 1983); *Gray v. Bell,* 712 F.2d 490, 505 (D.C. Cir. 1983); *Lojuk v. Quandt,* 706 F.2d 1456 (7th Cir. 1983); *Stepanian v. Addis,* 699 F.2d 1046 (11th Cir. 1983); *Spencer v. New Orleans Levee Board,* 737 F.2d 435 (5th Cir. 1984); *Williams v. Collins,* 728 F.2d 721 (5th Cir. 1984); *Franks v. Bolden,* 774 F.2d 1552 (11th Cir. 1985); *Johns v. Pettibone Corp.,* 769 F.2d 724 (11th Cir. 1985).

tation of *Barr* in *Norton v. McShane*, 332 F.2d 855 (5th Cir. 1964), wherein Judge Rives anticipated this Court's holding in *Doe, supra.* In *Norton*, the Circuit Court was presented with a case in which several members of the Justice Department had been sued for false arrest by three men arrested following riots at the University of Mississippi upon the enrollment of James Meredith as a student. In analyzing the *Barr* reasoning, Judge Rives first recognized the requirement that the defendant act within the "outer perimeter" of his authority in order to obtain immunity. He also emphasized that allegations of malice or concerning the rank of the official do not affect the availability of the defense. The basic premise and question to be addressed in order to obtain immunity, is whether or not the act of the official about which complaint is made, was a judgment or decision which it is necessary that the government official be free to make without fear or threat of vexatious or fictitious suits and alleged personal liability.[10]

Other circuits have discussed this balancing test wherein, absent either of the two standards, the "outer perimeter" of authority, and a "discretionary action", immunity fails. In *Jackson v. Kelly*, 557 F.2d 735 (10th Cir. 1977),[11] the balancing test was applied. The purpose of the balancing analysis is to go directly to the heart of the policy underlying the establishment of executive immunity. Immunity is justified under the rationale of *Barr, supra*, only in those instances in

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[10]"There is another limiting factor — the nature of the duties. It is often said that the officer must be performing a 'discretionary function'. In *Ove Gustavsson Contracting Co. v. Floete*, 299 F.2d 655, (2nd Cir. 1962), *cert. denied*, 374 U.S. 827, 83 S. Ct. 1862, 10 L. Ed. 2d 1050 (1962), Judge Medina explained what this requirement actually means: 'There is no litmus paper test to distinguish acts of discretion * *, and to require a finding of 'discretion' would merely postpone, for one step in the process of reasoning, the determination of the real question — is the act complained of the result of a judgment or decision which it is necessary that the Government official be free to make without fear or threat of vexatious or fictitious suits and alleged personal liability". (*Norton v. McShane*, 332 F.2d 855, 859 (5th Cir. 1964).

[11]"We read *Doe v. McMillan, supra*, as requiring us to balance the consideration of harm to the individual citizen with the threat to effective government in the context of this case before granting or refusing to grant defendant official immunity." (*Jackson v. Kelly*, 557 F.2d 535, 539 (10th Cir. 1977).

which the need to protect the effective administration of government outweighs the threat of harm to individual citizens. Conversely, where the availability of a remedy for harm to citizens has little or no impact on the operation of government, the defense of immunity would work a cruel tragedy without furthering any legitimate, larger interests. The *Jackson* Court, *supra*, finding that the allowance of a medical malpractice claim "would not tend to constrict government functioning in an area where prompt government judgments are essential", (*Id.*, at 739) held that the harm to citizens, namely physical injury or death, outweighed the need to protect those particular acts in question.

The issue then becomes whether or not certain activities can reasonably be defined as ministerial-operational, so as to preclude immunity, or do all activities involve some discretion so as to necessitate immunity based on the need for orderly governance. The Federal Torts Claims Act (FTCA) has traditionally construed activities as being discretionary or ministerial, so as to allow protection in those instances where governing would be effected in the absence of immunity. The Eighth Circuit, in the case of *Aslakson, et al. v. United States of America*, 790 F.2d 688 (8th Cir. 1986), (distinguishing *United States v. S.A. Empresa de Viacao Aerca Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984)), held in a Federal Tort Claims Act case government employees should not be immune when they fail to comply with regulations or policies designed to guide their actions in a particular situation though they may have had some discretion in the manners in which they conducted themselves. Further, in another FTCA action, *Drake Towing Company, Inc. v. Meisner Marine Construction Corp.*, 765 F.2d 1060 (11th Cir. 1985) the Eleventh Circuit held, contrary to the argument espoused by petitioners herein, that it was insufficient for the government to merely show there was some decision making involved in the activities undertaken.[12]

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[12]"For the government to show merely that some choice was involved in a decision-making process is insufficient to activate the discretionary function

The interpretation of both *Barr, supra,* and *Doe, supra,* by the Eleventh Circuit in *Franks v. Bolden,* 774 F.2d 1552 (11th Cir. 1985) directly sets out the two-prong test of immunity, and its application in weighing the contributions of immunity to effective government versus the recurring harm to an individual citizen.[13]

> "Although there is no 'ready-made' answer as to whether a defendant is entitled to immunity, the Supreme Court has indicated immunity is available to Federal employees exercising discretionary functions and acting within the outer perimeters of their duties. See *Doe,* at 322-23, 93 S. Ct. at 2029-30; *Barr,* 360 U.S. at 574-75, 79 S. Ct. at 1341; *Johns v. Pettibone Corp.,* 769 F.2d 724, 727 (11th Cir. 1985). 'We have recently noted, however, that not every act which might literally be termed 'discretionary' is sufficient to evoke the immunity doctrine. Indeed '[i]n the strict sense, every action of a government employee, except perhaps a conditioned reflex action, involves the use of some degree of discretion'. *Pettibone,* 769 F.2d at 728 (quoting *Swanson v. United States,* 229 F. Supp. 217, 219-20 (N.D. Cal. 1964)). To prevent the discretionary function requirement from being rendered meaningless, we have held that official immunity may be extended only to those acts of federal employees involving planning or policy considerations. See *Pettibone,* 769 F.2d at 728-29; *Alabama Electric Co-Operative, Inc. v. United States of America,* 769 F.2d 1523, 1525-28 (11th Cir. 1985). Where on the other hand, if the acts in question concern day-to-day operations, official immunity is not available."

Franks v. Bolden, 774 F.2d 1552, 1555 (11th Cir. 1985).

It is recognized that the immunity of government employees from personal liability under the official immunity doctrine is much broader than the immunity of the government itself, and that government employees are

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exception. The balancing of policy considerations is a necessary prerequisite." *Drake Towing Company, Inc. v. Meisner Marine Construction, Corp.,* 765 F.2d 1060, 1064, (11th Cir. 1985).

[13]"The application of the official immunity doctrine in a particular case depends on 'a discerning inquiry into whether the contribution of immunity to effective government. . . outweigh the perhaps recurring harm to the individual citizen' ". *Franks, supra,* (quoting *Doe v. McMillan,* 412 U.S. 306, 320, 93 S.Ct. 2018, 2028, 36 L.Ed. 2d 912 (1973)).

immune in many cases where the government may not be, because of differing policies behind the two immunities. Nevertheless, there continues to be the distinction between activities of the employee applying to governance, (i.e. establishing the policy of government) and those that are related solely to day-to-day operations in administering the policies and activities of government.

The policy lying at the very heart of the decision of *Barr v. Matteo, supra,* is the preceived need to protect the discretion used by federal executive officials, not only in the formation of policy, but also in the "fearless, vigorous, and effective administration of policies of government". *Barr,* at 571. Although certainly the execution of policy is something different from the formulation of policy, the discretion involved is nevertheless governmental. Policies formulated by government, almost always and of necessity, are broad guidelines for conduct, stated with vagueness and ambiguity inherent in the broadness. In applying such policies, executive officials must exercise judgment and discretion to make policy respond to the specific circumstances of narrow factual situations. Also, the degree of discretion necessarily entrusted to executive officers is in direct relation to the officer's position to the hierarchy of authority.[14]

At the top of the chain of authority, the executive officer must exercise a great deal of discretion because he is faced with a broader spectrum of divergent situations. The lower the officer in the hierarchy, however, the less discretion he needs to function; this is simply because the lower in the hierarchy, the less divergent situations the officer must face and the more specific are the instructions he has received from superiors. Tasks become more routine, less unique in the lower levels of any scheme of authority. Further, as a consequence of the trickle process, rules and regulations with which he is expected to act and guidelines for the performance of his activity have been established. Addi-

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[14] This Court, in *Barr,* and *Doe,* confirmed that "the immunity conferred might not be the same for all officials for all purposes". *Barr, supra,* at 573-4; *Doe, supra,* at 319.

tionally, as a consequence of his duty, he must carry out those activities in such a manner, under all laws, so as to not injure his fellow man. Indeed, at the lowest levels, there is little if any discretion, as the instructions and regulations guiding conduct in the lowest levels become very focused, and very specific. By reference to the lowest levels, however, one cannot necessarily assume that line employees are the only individuals of government who should not be entitled to immunity. As has previously been stated, the litmus test is whether or not the activities involve planning or policy considerations and as such, in the event there is immunity, does it out-weigh the perhaps recurring harm to the individual citizen. Contrary to the assertions of the petitioners, there has been consistency in applying these tests. Granted, the mere availability of suit does cause some hardship and disruption; however, when weighed against the perhaps recurring harm to individual citizens, an objective guideline can be established which has been applied to this point in time in a relatively consistent manner by the circuit courts interpreting the opinions of this Court.

It must be remembered that this Court, by fashioning the "executive immunity" doctrine, in *Barr, supra,* viewed that privilege as an "expression of policy designed to aid in the effective functioning of government". (*Id.* at 572-3). Consistent with that policy, the category of discretion most in need of the privilege is that discretion characteristic of the "functioning of government", as distinct from routine, common-place judgments. In the largest sense of the word, indeed, everything done by every federal employee is governmental. That does not, however, answer the question whether every act of every federal employee which involves some quality that can be termed discretionary, should be shielded by immunity. To state so broad a rule would effectively immunize every federal executive officer, agent, and employee. Such a result would be clearly contrary to this Court's instructions in *Doe, supra,* where it was cautioned that there was no fixed, invariable rule of executive immunity, but that one ought to weigh the need to protect *some* discretion against the need to remedy harms to

citizens.[15] Discretion shielded by the privilege must be such that its contribution to "effective government" is more important in the larger scheme of things than the need to remedy harms done to individuals. The discretion involved must be worthy of being called "governmental", more than the mere shallow, routine, or trival.[16]

The circuits have wrestled with the problems of limiting the privilege to those acts of discretion most deserving and most critical to the administration of government. In *Henderson v. Bluemink*, 511 F.2d 399 (D.C. Cir. 1974), the Court of Appeals, while emphasizing the death of the "government-proprietary" distinction, recognized a new test founded on the distinction between "governmental" acts and "ministerial" acts.[17]

A previous case, *Estate of Burks v. Ross*, 438 F.2d 230 (6th Cir. 1971) did grant immunity to doctors while nurses were not granted immunity. This holding was soundly criticized and rejected in *Henderson, supra.* Nevertheless, the test remains the same throughout the cases. The key is the functional analysis of the conduct of the defendant. If the conduct is such that there are recognized standards, precise instructions, or mandatory duties for its performance, it cannot be properly characterized as the type of discretion sheltered by the immunity doctrine. That functional analysis of *Doe, supra,* was, is, and should be, sufficient for determining under what circumstances immunity should apply. Its object is to seek to find out whether or not the acts of the official are governmental in nature, or operational, so that they come within mandatory duties, standards, or

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[15]*Doe, supra,* at 320.

[16]*See Norton v. McShane,* 332 F.2d 855, (5th Cir. 1964), quoting *Ove Gustavvson Contracting Co. v. Floete,* 299 F.2d 655 (2nd Cir. 1962), *cert. denied,* 374 U.S. 827, 83 S. Ct. 1862 10 L.Ed. 2d 1050 (1963); *Spencer v. New Orleans Levee Board,* 737 F.2d 435, 437 (5th Cir. 1984).

[17]Holding that the Army doctor was not immune from malpractice liability, the court reasoned: "To be sure, the acts complained of involved the exercise of discretion in the normal usage of that term but the significant factor is that the discretion exercised might have been medical rather than governmental. The chief policy underlying the creation of immunity for lower governmental officials

orders, that can be readily ascertained. All activities of government cannot be those "where the concept of duty encompasses the sound discretionary authority". *Barr, supra,* at 575. No clearer statement could be found that not all decisions for acts of discretion by government employees are immune, but only those critical to the effective administration of policy.

The policy decisions related to immunity are the same now as they were when this Court decided *Barr, supra,* and *Doe, supra.* The Court correctly decided that in order for there to be an orderly process of governing, under certain circumstances, those in whose trust the cloak of governing has been bestowed, should be cloaked with immunity, so as to o provide unfettered discretion for the best of all. Also, this Court recognized that certain other activities of government employees are not so related to the activity of governing so as to out-weigh the right of the individual to pursue remedies that do not effect governing. In such circumstances where the activities did not arise out of discretionary functions related to the carrying on of government, there would be no distinction in the immunities provided a government employee than any other in society. Though petitioners herein argue that private enterprise does provide "compensation" commensurate with the risks attached to the position of the employee, and the government, does not, to the contrary, many agencies of government, such as TVA, do provide for payment of judgments against their employees in suits brought against the em-

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is mainly that which stems from the desire to discourage [sic — encourage?] 'the fearless, vigorous, and effective administration of policies of government'. However, that policy is not applicable to the exercise of normal medical discretion since doctors making judgments would face the same liability outside of government service as they would if the complaint below is upheld. *A fortiori,* the threat of liability for negligence would not deter the fearless exercise of medical discretion within government service any more than the same threat deters the exercise of medical discretion outside of government." *Henderson v. Bluemink,* 511 F.2d 399, 402-3 (D.C. Cir. 1974); see also *Jackson v. Kelly,* 557 F.2d 735 (10th Cir. 1977); *Lojuk v. Quandt,* 706 F.2d 1456 (7th Cir. 1983); *Burchfield v. Regents of the University of Colorado,* 516 F. Supp. 1301 (D. Colo. 1981).

ployees arising out of and in the course of, their employment. This Court has recognized, and its rule has been applied, that there should be no distinction in our society between wrongs committed by a non-governmental employee and a government employee, so long as those wrongs do not arise out of a function that, does effect governing, notwithstanding the fact the wrong may involve a "modicum" of discretion.

As applied to the facts in this case, and contrary to the position of petitioners, and consistent with the prior holding of the Eleventh Circuit in *Heathcoat v. Potts,* 790 F.2d 1540 (11th Cir. 1986) and *Johns v. Pettibone Corp.,* 769 F.2d 724 (11th Cir. 1985) there are issues of material fact as to whether the activities of the petitioners herein were operational in nature or discretionary. Applying the two-prong test, and admitting the activities of the petitioners were within the outer perimeters of their authority, it cannot be said, based on the law as applied to the particular functions of these petitioners, that immunity attaches. As was said by the Eleventh Circuit, every action of a government employee except perhaps a conditioned reflex action involves the use of some degree of discretion.[18] To cloak each and every government employee with immunity in any activity in which he is involved, defeats the specific tenants of *Barr, supra,* and *Doe, supra,* all at the expense of the injured party.

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[18]*Johns v. Pettibone,* 769 F.2d 724, 728 (11th Cir. 1985).

CONCLUSION

The judgment of the court of appeals should be affirmed.
Respectfully submitted.

M. Clay Alspaugh
HOGAN, SMITH, ALSPAUGH,
SAMPLES & PRATT, P.C.
Attorneys for Respondents
1000 City Federal Building
Birmingham Alabama 35203

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